DENSITY TRANSFERS

A comparative analysis of density transfer policies in several North American cities

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1. Introduction

The City of Toronto Planning and Development Department is currently reviewing the City's Official Plan policies relating to the transfer of development rights or density from one property to another within the Central Area. As part of that study, Berridge Lewinberg Associates has been commissioned to undertake a comparative analysis of similar policies in a limited number of cities across North America.

The purpose of this paper, therefore, is to document the policies and experiences of six major cities which may be facing similar pressures and constraints. Beyond describing the policy context in the other cities, we have attempted to draw limited conclusions from our review which will hopefully assist the City in reaching its own conclusions concerning a new policy for Toronto.

Research was undertaken for the cities of Vancouver, New York, San Francisco, Dallas, Chicago and Boston. The specific policy provisions extracted from the planning documents were obtained. This information was supplemented by extensive telephone interviews with officials of the relevant municipalities. In the case of the City of New York these interviews were in turn supplemented with face-to-face interviews with planners and lawyers familiar with the density transfer process.

The report begins by describing the relevant policies in each of the municipalities and provides a limited analysis of the experience in implementation of the policy. The descriptions are drawn together in a concluding section regarding the relative success of transfer of density policies and the lessons to be learned for Toronto. While these conclusions will likely prove useful in the determination of appropriate policies for the City of Toronto, it must be noted that the planning and legal context in most cities in the United States is quite different and policies are not directly transferable.

2. Vancouver

2.1 Introduction

On January 25, 1983, Vancouver City Council approved a policy statement which would allow it to consider rezoning applications which involve the transfer of density from one site to another. The transfer could only be considered if it would assist in achieving one or more stated public objectives, and then meet certain limitations which were to be respected in the implementation. City Council also approved a seven step process to be generally followed in applying for the transfer of density. Council's objectives and the process are outlined below.

2.2 Transfer of Density Policy

2.2.1 Objectives

Vancouver's policy permits Council to consider rezoning applications which involve the transfer of density from one site to another, provided that the transfer will assist in achieving one or more of the following public objectives:

"i. the preservation of heritage buildings or sites, with particular encouragement for usage as affordable housing or cultural, educational, recreational or social uses,

ii. the creation of desirable public open space or park land,

iii. facilitate development in areas with mixed use zoning,

iv. achieve an improved urban design."

2.2.2 Limitations

The policy stipulates that proposed density transfers be subject to the following limitations:

"a. the sites are not separated by a zoning boundary or use, density or height district boundary in an Official Development Plan, unless the sites involved are both within the same block,

b. if the objective to be served is (iv.) urban design, then the sites are within the same block or separated only by a single street,

c. the aggregate development potential for the two sites remains unchanged by the transfer,

d. the aggregate development potential for any specific use remains unchanged by the transfer,

e. no bonuses are transferred other than those inherent in mixed use zoning,

f. no more than two sites are involved in any transfer and a site is not involved in more than one transfer,

g. the proposal has been demonstrated to further the intent of Council's policies and regulations for the area."

These transfer of density provisions are not specific to any area of the City. However, it was the expectation of the planners that most applications would involve sites within the Central Area. Moreover, no limit has been placed on the distance between the sites, although the first limitation restricts the transfer to sites within the same zoning category, with the exception of sites within the same block.

2.2.3 Process

In establishing the transfer of density process, the City of Vancouver Planning Department also laid out a series of steps to be followed by the proponent of a transfer of density. The process starts with informal discussions with the Planning Director, and each step is defined to the enactment of a bylaw. The procedure provides for the submission of a formal development permit application at the same time as the density transfer application. It is felt appropriate to undertake these applications concurrently in order to be able to fully evaluate the suitability of a recipient site to accommodate the additional density.

Our discussions with Planning staff indicate that many enquiries, especially those which do not conform to the policy, do not proceed beyond the first step, that is, the informal discussions with the Planning Director. Staff is quick to indicate to developers that it will not support any contravention or bending of the rules.

2.3 Implementation

In the three years since the policy has been in force, three rezoning applications involving transfers of density have been approved. Each of these was for a development in the Downtown District and conformed fully to the criteria and limitations set out in the Transfer of Density policy.

Up to the present time, the creation of public open space or parks has been the major public objective for applications for density

transfers. It appears that developers chose to consolidate density at one location, and have used the medium of park creation to achieve these integrated densities. There has been one application approved for facilitating development in areas with mixed-use zoning.

Density transfers have not been used to achieve improved urban design or the preservation of historic buildings, although there has been some interest expressed through inquiries. Although proposals had been received which would not meet the limitations stipulated in the policy, these proposals were discouraged by staff and were consequently never received as formal applications.

In one case, for example, a transfer of density was proposed from a potential park location to an unconnected, unspecified site in the Downtown District. This proposal would have contravened the limitation that the sites be within the same zoning category or at least on the same block. In a general review of the density transfer policy, the Planning Department outlined this proposal for Council to consider in light of potential amendments to the existing policy. At the same time, they put forward the following reasons for retaining the policy as it is:

* to maintain public policies regarding the amount of development permitted in different areas;

* to maintain the integrity of the market by ensuring that development rights are fixed to a particular zoned area;

* to maintain reasonable administrative rationality; and

* to avoid the complexities of equating development rights in differently zoned areas.

In other words, the planners recommended that Council hold firm on the development potential accorded different areas and generally avoid the administrative and economic complexities of transferring densities between different zones. Council chose to maintain the policy as it was.

2.4 Analysis

Certain important conclusions have emerged from our review of the Vancouver policy and our discussions with the planners. The policy is considered to be successful from the point of view of both the real estate industry as well as City Hall.

Vancouver's general objects are very broad and encompass a wide set public objectives for which density transfers are considered to be appropriate. The conclusion here is that there is no reason to artificially limit the range of objectives under which

developers might apply to transfer density provided the objectives have clear public support.

In Vancouver the specific criteria which each application must meet are relatively complex, detailed and clearly established. While they clearly represent an example of quite stringent rules, they do not appear to be so complex that they make a successful application within the rules a virtual impossibility.

Finally, and most important of all, is the fact that the planning staff and City Council have given a clear message to the industry that under no circumstances will the rules be altered. Therefore, while the objectives are broad, the criteria are strict and every actor in the industry understands their implications. There is certainty in the market place. We understand this to be the most important reason for the relative satisfaction with which Vancouverites view their density transfer policies.

3. New York

3.1 Zoning Ordinance

Land use in New York City is governed by a single regulatory document, the Zoning Ordinance. As in the other American case study cities, there is no second level planning document such as an Official Plan. The Zoning Ordinance grants as-of-right development rights. However, it also contains Special Permit provisions under which, at the discretion of the City Planning Commission, transfers of density, density bonuses or exemptions from bulk and setback regulations may be granted. Such Special Permits also require approval of the Board of Estimate, New York City's version of an Executive Committee.

3.2 Transfer of Density Policy

There is only one public objective in the New York Zoning Ordinance under which transfers of development rights are permitted. This involves transfers from landmark buildings, including special provisions for transfers from landmark theatres. In addition, the City is presently reviewing various techniques for the transfer of density from all theatres in the Theatre District.

3.2.1 Transfer of Development Rights from Landmark Sites

Provisions regarding transfers of development rights from landmark sites are contained in the Special Permits section of the Ordinance. A landmark or "heritage" building is a structure designated by the Landmarks Preservation Commission and is similar to an historically designated structure under the Ontario Heritage Act.

The Ordinance permits density to be transferred from a site occupied by a landmark building to an adjacent lot. For these purposes an adjacent lot is defined as a lot which is contiguous for at least 10 feet. In some cases, especially where the lot is in a high density zone, the term "adjacent" is broadened to include lots immediately across the street or fronting on to the same intersection and opposite lots adjacent to the landmark lot.

The amount of density which can be transferred from a landmark site is equal to the maximum allowable density for the site, less the total floor area of all buildings existing on the landmark site. The unused density may be transferred to one or number of adjacent lots provided that no more than two ownerships are involved.

The maximum density that can be developed on the receiving site varies between high bulk density areas and low bulk areas. Low

bulk areas are zones in which densities of less than 12.0 times the area of the lot are permitted. In a low bulk area the receiving site can only increase its density by 20 per cent as a result of the transfer of density from a landmark lot. In high bulk zones there is no limit to the floor area that may be transferred.

Transfers of density in all zones are subject to a detailed review in which a number of considerations are taken into account. These include the impact of the new development on the surrounding area, the compatibility of its design with the adjacent historic building and conditions relating to the maintenance and preservation of the landmark building. These criteria are laid out in the Ordinance.

The Ordinance also makes provision for the relaxation of specific requirements usually applicable on the receiving lot, when a transfer of density is being implemented. Both City Planning and the Landmark Preservation Commission must be satisfied that the relaxations provide for an aesthetic and effective relationship between the new development and the landmark building. The issues which may be varied include minimum required open space, height and setback provisions, plaza, arcade and yard regulations.

These provisions of the Ordinance are amended by provisions contained in the Special Midtown District section relating to transfers of density from landmarks theatres located in the Theatre Subdistrict. Transfers from these buildings are subject to the same conditions as transfers from landmark sites in the high bulk dstricts, in terms of the location of the lots to which density may be transferred and the fact that no maximum permitted increase in floor area is established.

If there are intervening lots between the landmark and development sites, they must be in common ownership and occupied by listed theatres or by uses which are related to the theatre industry. Moreover, the development is required to provide useful circulation improvements or other public facilities on one or more of the intervening lots to accommodate pedestrian or vehicular traffic generated by the theatres.

Transfers of density from landmark theatres are subject to the further restriction that written assurances of the continued theatre use are required prior to the issuance of the Special Permit.

Once a density transfer is approved an Instrument of Transfer and Notice of Restriction on further development of the landmark and adjacent lots are registered on title.

3.2.2 Large Scale Development

The Large Scale Development provisions of the Zoning Ordinance also relate to the issue of density transfers. The Zoning Ordinance allows certain limited density transfers to occur in relation to large scale developments. These are defined as commercial developments of over 3 acres, or residential developments of 1.5 acres.

In these cases density may be transferred directly across a street to another lot which would be contiguous were there no intervening street. No bonuses are permitted under this provision and the total gross floor area of the donor and the receiving lot must be no greater than that permitted on the two lots had no transfer taken place. Within such a large scale development all zoning lots must be under the same ownership.

The purpose of these provisions is to facilitate the coordinated planning of large projects such Lincoln West or other major urban developments. As a practical matter such major projects are generally treated separately under the City Planning procedures. A similar provision is written into the Ordinance to permit such transfer of density across intervening streets within the South Street Seaport Special District.

3.2.3 Zoning Lot Mergers

The final policy which relates to density transfers is the Zoning Lot Merger policy. Provisions in the Ordinance permit mergers of lots to create larger zoning "lots", purely for zoning purposes. This has had the effect of permitting the redistribution of density within a block, if the various owners agree to create a merged "zoning lot". In non-landmark situations mergers of adjacent lots within a block are permitted if a Declaration of Restrictions is registered clearly establishing that for zoning purposes the separate ownerships are one lot. For purposes of this section, contiguous means that the lots have to touch for a minimum of 10 linear feet.

Such zoning lot mergers are also permitted in landmark situations. The combination of the landmark transfer and the zoning lot merger policies can result in a situation in which floor area is transferred a considerable distance. A transfer might occur across a street to a lot opposite which is then in turn merged in a chain of ownership to a lot on the same block which might be facing on to a different street or avenue. In addition, in such cases, the City Planning Commission may permit certain exemptions from the normal applicable standards for height, bulk and setbacks.

Only one such development has occurred thus far in New York City, when the density from Grand Central Station, a landmark building, was distributed over a number of adjacent lots. However, another development utilizing these provisions is currently being contemplated near Carnegie Hall.

3.3 Procedures

Applications for a special permit to allow a transfer of development rights are submitted to the City Planning Commission, and are subject to the Uniform Land Use Review Procedure (ULURP). The ULURP process is a very precise and formal set of procedures and time periods for the City staff and political review of any major land use change. In addition, any application for transfer under the landmark provisions requires the approval of the Landmark Preservation Commission.

The entire procedure can take up to two years to complete and is expensive. As in the case of a rezoning in Canadian cities the density transfer is discretionary, based on the review which is undertaken by the various Commissions'.

In practice very few transfers of development rights have taken place in the City of New York. The more common procedure is for the floor area pertaining to a landmark structure to be moved to an adjacent lot which is merged for zoning purposes with the landmark lot. Developers seem to prefer to utilize the lot merger provisions in the Ordinance rather than the transfer provisions under the Landmark Special Permit section. This is likely because of the lengthy Landmark Review and the Uniform Land Use Review Procedures.

3.4 Implementation

The most significant example of a density transfer is that of Grand Central Railway Station where zoning rights still exist from that landmark preservation and are capable of being transferred to a number of adjacent sites. Most recently the Philip Morris development immediately south and west of Grand Central was the recipient of Grand Central generated development rights.

Another example of a density transfer across a street is the case of 60 Wall Street where density was transferred directly across Wall Street from the landmark City Corp. building. These transfers have taken place in the high bulk zones where there is no cap on the amount of transferrable density.

The relaxation of height, bulk, and setback provisions in the event of zoning lot mergers involving a landmark structure has caused some public concern. Most recently the City sold the development rights from the City Center, a landmark structure, to

an adjacent privately owned parcel. This resulted in a seventy story building adjacent to a much smaller, and more delicate landmark structure.

The New York City density transfer policy is relatively restrictive. This is likely to remain the case in part because of a recent decision by the Court of Appeal concerning Tudor City. Tudor City is a major residential development on the East Side, in which the owner had attempted to develop a new structure within the middle of an existing project. The issue became extremely controversial and the City, seeking to diffuse it, proposed that the applicable development rights be transferred to almost anywhere elsewhere in the City. This proposal was struck down by the Court of Appeal for two reasons: first, that it deprived the owner of beneficial use of his property; and second, because it felt that the transfer rights were themselves illusory since there was no defined receiving site. As a result the City has not attempted to create any further transfer policies and is in fact moving in the other direction.

The move away from density transfers is exemplified by the City's reactions to a proposed density transfer policy aimed at strengthening the Theatre District. A firm of planning consultants was recently commissioned by the New York Theatre Advisory Council to develop a policy for the preservation of theatres in the Theatre District. Densities within part of this area were increased from 15.0 to 18.0 times the area of the lot in order to encourage office building to be developed on the West Side. Such increases in density are making it attractive to consider some of the theatre sites for redevelopment, thus threatening their continued existence.

The consultants recommended that theatres be permitted to transfer their excess density to any other site within the defined Theatre District, in exchange for long-term agreements binding the maintenance of theaters in theatre use. The report established policies for controlling the results of the transfer on the receiving sites.

The City did not approve this policy due to concerns about the effect of large volumes of potentially floating density on the area. The City planners concluded that this would negate the certainty of the Zoning Ordinance and might leave the City open to a suit from neighbours of receiving sites and from other owners who were not permitted similar receiving rights.

The City's emerging policy for the Theatre District now involves the creation of a theatre retention bonus, rather than a transfer of development rights. A theatre site on one of the midtown streets would have a base density and a bonus. This bonus could be developed on 8th Avenue frontage, an adjacent major Avenue,

subject to an 8th Avenue developer entering into an agreement for the permanent retention of the theatre.

The City is of the view that the bonus proposal is equitable for the theatres since a theatre owner could choose to take advantage of the bonus on its own site or to enter into an agreement with an 8th Avenue developer. However, theatre owners appear to be unwilling to commit to such a long-term agreement and would prefer a looser arrangement in which they would commit some portion of the value of the transfer rights to a theatre retention fund. Although the City does not view this mechanism as a density transfer, it does in effect involve the transfer of density from theatres on internal streets to sites on 8th Avenue.

3.5 Analysis

In general, City officials and consultants both agree that New York's policy on density transfers works well and that it should remain as restrictive as it now is. There is a general reaction against opening the "pandora's box" towards any broader density transfer policy.

Densities in New York City are already very high when compared with any other North American city. There are also a number of specific means of securing additional density bonuses in return for specific public benefits. Thus the physical impact of transferring densities can be considerable on any location.

The real estate market in New York is also very active and land values are very high. This translates into a sensitive market context in which every move made on one site by the City is closely watched and soon translated into similar expectations for surrounding properties. As a result, planning and regulation in New York is tending towards less discretion and more certainty in the interpretation of development rights on any project. The aspect of precedent setting is always taken into account when discretionary land use decisions are made.

The substantial approval procedures requiring a major review have dissuaded most developers from proceeding with landmark transfers. Any application for change tends to be lengthy and is very carefully scrutinized. As a result only the major projects, where a long delay and major expenses in making the case can be justified, will attempt the process.

City planners are also of the opinion that less restrictive transfer policies create a lack of confidence in the basic Zoning Ordinance. With the high densities in New York any coherent urban design strategy might be lost if transfers are readily allowed. The predictability and equity of the basic land use regulating

document would, in the opinion of both the planners and the development community, disappear.

4. San Francisco

4.1 Introduction

The San Francisco Zoning Ordinance was passed in October 1985 as a result of an extensive downtown planning process culminating in the Downtown Plan in November 1984.

The Downtown Plan envisaged two public objectives under which density could be transferred from one lot to another:

* from lots containing landmark or designated buildings; and

* in situations where needed open spaces or plazas are provided, over and above those required under other provisions.

Although envisioned in the Downtown Plan, only the landmark transfer provisions were translated into the implementing Zoning Ordinance. The Downtown Plan document has no continuing legal application since San Francisco, like other American cities, only regulates through the Zoning Ordinance.

4.2 Transfer of Density Policy

San Francisco's Zoning Ordinance contains a major and highly detailed section dealing with the transfer of development rights.

Section 128 deals specifically with the transfer of development rights in C-3 districts, the office section of the Downtown. These are the highest density commercial districts with densities ranging from 5.0 to 9.0 times the area of the lot. The density transfer policy which has been developed for these districts is very sophisticated.

The Zoning Ordinance allows density to be transferred from a Preservation Lot, which is a lot containing an historic, architectural or aesthetic landmark as defined in the Landmark Ordinance. The Preservation Lot becomes the Transfer Lot if it contains unused gross floor area which can be transferred.

The amount of density available to be transferred consists of the difference between the maximum allowable gross floor area and the gross floor area existing on the lot. This difference is measured in Transferable Development Rights (TDR), with one unit of TDR comprising one square foot of gross floor area. The existing landmark building must be retained as part of the process.

These Transferable Development Rights have an existence independent of any specific lot. They are in effect a form of

zoning currency which may be spent either on a single development lot, distributed over a number of such development lots, or held for future transfer. They may be bought and sold in total or in part.

4.2.1 Conditions for Transfers of Density

The Zoning Ordinance sets out the conditions under which transfers can take place:

i. The transfer lot and the development lot are located in the same zoning district.

ii. The transfer lot is in the financial core or on the edges of the core where it is beginning to encroach on such neighbourhoods as Chinatown and Nob Hill, and the development lot or lots are in the South of Market area in blocks to which the City wishes to direct office growth.

iii. TDR may not be transferred to any lots containing a designated building. However, this restriction can be lifted under two circumstances:

- if the designation is removed; or,

- if additional space is required to make it economically feasible to bring the designated building up to standards for seismic loads and forces.

iv. Development on the development lot is governed by all the provisions of the Zoning Ordinance (with the exception of those on floor area ratio) which relate to such matters as height, bulk, setback, sunlight access, and separation between towers.

Essentially, TDR may only be transferred from one lot to another with in the same C-3 zoning district or to C-3 Special Development districts which are located to the south of Market Street. This latter provision exists in order to relieve some of the development pressure in the core financial district and move it to under-used commercial/industrial land to the south and east of the downtown.

The Ordinance establishes that no bonusing is permitted in conjunction with TDR and that the sum of the developed densities on both the transfer lot and the development lot or lots must not exceed the maximums allowed in the Zoning Ordinance for both lots. Transfer of TDR from a Transfer Lot permanently reduces the development potential of the Transfer Lot by the amount of the TDR transferred.

4.2.2 Procedures for Transfer of TDR

An elaborate recording process has been established for the transfers of development rights. Rules exist in the Ordinance for determining the eligibility for transfer lot status and the amount of TDR, each equivalent to one square foot of gross floor area, available for transfer.

The amount of TDR is determined solely by the Zoning Administrator of the City, although mechanisms have been created for appealing the decision. Once the final TDR count has been fixed, it is recorded in a Statement of Eligibility in the Office of the County Recorder. However, the sale of the TDR remains a commercial transaction between two private parties always subject to the approval of the City.

The Zoning Ordinance states clearly the mechanism for transferring TDR's:

> "TDR from a single transfer lot may be transferred as a group to a single transferee or in separate increments to separate transferees. TDR may be transferred either directly from the original owner of the TDR to the owner of a development lot or the persons firms or entities who require the TDR from the original owner of the TDR and hold them for subsequent transfer to other persons firms or entities and to the owners of a development lot or lots."

As stated earlier the TDR represent a form of zoning currency and may be bought and sold in total or in part. Within the sophisticated certification and recording process the objective is to create extremely flexible use of TDR.

The final provision of the TDR section of the ordinance indicates that all TDR exist only as long and to the extent authorized by the provisions of the Zoning Ordinance. Upon repeal or amendment of the Ordinance the TDR would only convey such rights and privileges as would be permitted under such repeal or amendment. This provision would seem to allow the San Francisco Board of Supervisors, who have exclusive jurisdiction over the planning process, to greatly effect the value of this TDR currency.

4.3 Implementation

One transfer, from the financial core to the South of Market area has already been completed. At present the City has five development applications before it, four of them involving TDR, two within the same district and two transfers to the South of Market area. The Commissioner of Planning is in the process of determining which, if any, of these proposals will be accepted. All proposals to date have involved the direct transfer of TDR

from one site to another. It was considered unlikely that developers would wish to acquire TDR without utilizing them immediately, because of the possible ambiguity over their future value.

A factor which contributes considerably to the ambiguity over the future value of TDR is the fact that the Zoning Ordinance contains a limitation of 2.85 million square feet of commercial office development in the downtown over the next three years. In fact, as a result of developments already in the approval process the majority of the available floor area is already committed. Thus, the Ordinance has effectively placed a limitation on further downtown development and limited the viability of some density transfers in the area over the three year period. Transfers to the South of Market area are not affected by this limitation, however, it is likely that lower values will be received for transfers to this area.

4.4 Analysis

The San Francisco Zoning Ordinance contains only a relatively narrow basis for considering a density transfer, that of landmark preservation. However, the implementation of the policy is very flexible indeed.

The policy is direct and simple in achieving its ends, that of landmark preservation. The sale of density and its creation need not be linked in any way. The criteria for applying the density to new sites are also clearly spelled out in terms of location and scale of final development. Physical requirements that the normal height, bulk, and set back regulations apply, play an important role in determining the final outcome.

Little pressure to seek exemptions from the policy are anticipated due to the flexibility of the regulations. It would be difficult for a developer to argue that changes are required when the option always exists to simply bank the density for use in the future when an appropriate receiving site can be found.

San Francisco has had a relatively brief experience of this policy. Our major concern would be the role played by the Commissioner of Planning who appears to wield a considerable amount of discretion in choosing whether sites are suitable for accepting TDR or not. For example, it is not clear that the Commissioner will approve any of the applications currently before him.

The TDR policy was based on extensive research into the likely effects of the policy on the real estate market and the physical impact on both donor and receiving areas of the City. A precise calibration of the potential of the South of Market area to absorb

transferred floor area was undertaken. The idea of allowing density transfers to create new open spaces as advocated in the Downtown Plan was rejected because its extent and therefore its impact was uncertain. As a result, its impact on the real estate market was felt to be potentially disruptive.

Clearly a policy which allows density rights to be banked for future use must have a fairly limited application. If massive amounts of density are permitted to be built up, the application of that density could have major impacts on the future shape of the City. It would be difficult to imagine a City refusing to allow such density to be applied in some location or another, once it has allowed the density to be created in return for a public benefit. Thus some realistic estimate of the physical impact and extent of potential transfers must be made if such a policy is to be followed.

5. Dallas

5.1 Introduction

In December 1982 the City of Dallas adopted an eight point incentive program aimed at preserving historic buildings in its Central Business District. It chose to achieve this through measures aimed at improving the financial feasibility of renovation of historic landmarks in its central area. One component of this eight point incentive package is the transfer of development rights.

5.2 Transfer of Development Rights

The Dallas policy permits the transfer of development rights from a site containing a building which has been either designated as a historic landmark in the central business district or listed as a "contributing structure" and is located in the West End Historic District.

As in most of the other cities, development rights are defined as the difference between the actual floor area of the structures on the lot and the maximum permitted floor area for the site. The recipient of a density transfer may in turn resell any unused development rights.

There are a number of conditions to be fulfilled in order to be eligible for a density transfer:

* the building be designated or listed as a "contributing structure";
* the building must have been restored within the preceding five years;
* the total value of the building improvements must exceed 50 per cent of the assessed value of the structure immediately prior to the restoration;
* the minimum gross floor area to be transferred is 20,000 square feet;
* the maximum floor area ratio may be increased by no more than 4:1 through the transfer; and
* the development rights may only be transferred to the Pedestrian Core Area Primary and Secondary Subdistricts.

5.3 Implementation

Dallas City Council adopted the Ordinance permitting the transfer of development rights in December 1982. In March 1984 it was amended to expand the designated area to which Development Rights might be transferred and to permit the resale of unused development rights.

In the three years since the policy was adopted, it has never been used, despite the amendments to make it more flexible. The lack of interest in the policy is due to the fact that the permitted density in downtown Dallas of 24.0 times the area of the lot is sufficiently high so that developers have no incentive to gain extra density through a density transfer.

5.4 Analysis

It appears that until density becomes a scarcer commodity, there will be little interest in the transfer of development rights in Dallas. Thus, the City's goal of encouraging the restoration and preservation of historic structures has not been furthered by the implementation of this policy.

The experience of Dallas assists in highlighting the fact that the density transfer mechanism must be understood as part of program of achieving desirable public benefits. Key to establishing the appropriate policy is the relationship between land values, the development climate or market in the City, as-of-right densities, permissible bonuses which can be secured without density transfer, and finally, the incentive added by such a transfer. A transfer policy should therefore seek desirable public objectives and a measure of its success is whether or not it is in fact used to produce those ends.

6. Chicago

The City of Chicago has no mechanism for the transfer of development rights. It operates under a Zoning Ordinance developed in 1957-58, any variance from which is undertaken through what is called a Planned Development.

Any developments over a certain size in site area or number of suites or height, are processed through the Planned Development system, which contains no policies for density transfers. Consequently, even if a request were made for a transfer as a part of a Planned Development application, the City would have no means of handling it and would most likely refuse it.

Chicago's goals of preserving its remarkable stock of landmark buildings is thus achieved through application of the landmark provisions and through the requirement that any development of any size go through the Planned Development process. This process permits the City considerable discretionary review and approval and provides an additional technique for landmark preservation. The City Planning Department had considered the idea of density transfers, particularly in relation to a historic building preservation policy. They rejected such a policy largely because of the problems associated with establishing appropriate controls over the receiving sites and monitoring density movements between sites.

As in the case of Dallas, it is possible to achieve very high densities in Chicago through direct density bonuses which can be secured. Thus the pressure or incentive for securing density transfers may not be necessary in this City as sufficient density is available through the existing system.

7. Boston

A conversation with officials of the Boston Redevelopment Authority revealed that Boston does not have any provisions to allow transfers of density.

The Boston Redevelopment Authority is presently creating guidelines for development in downtown Boston. However, they do not expect to be developing any density transfer provisions.

With respect to the preservation of historic buildings or areas, Massachussets State Law enables municipalities, through a Landmarks Commission, to designate certain areas as historic. In such areas demolition may be prohibited.

The character and quality of development in Boston is strictly monitored by two Architectural Review Commissions which have stringent powers over development. In addition, the City of Boston also has the ability to regulate development through their design review process.

The mechanisms which Boston has at its disposal to influence development and encourage the preservation of historic buildings seem to be sufficient in order to achieve their goals without resorting to a density transfer policy.

Once again this illustrates the relationship between public objectives and the policy. In Boston such a policy is not required because State law permits historical preservation without providing any incentive in return. We were not able to undertake any assessment of the success which this relatively harsh policy has compared to one which achieves a similar result which is economically viable for the developer while achieving the public's objective of preservation.

8. Conclusions

From our review of the density transfer provisions of several municipalities in North America have emerged certain observations and conclusions regarding the objectives, procedures and implementation of the various density transfer policies.

8.1 Density Transfers: A Viable Policy

Our review indicates that a density transfer policy is a viable and workable instrument which can be a useful part of the array of land use regulations available to a municipality.

As with most land use controls there is a strong relationship between the operation of the land market and the density transfer policy. The policy must be framed with an awareness of this linkage and its impact. For example, in Dallas where permitted densities are very high the density transfer has no market value and essentially provides no incentive to achieve the policy ends which the city seeks. New York, in contrast, has a very strong market which is always seeking ways to build larger buildings. As a result the City has enacted a transfer policy which is very tightly circumscribed.

The transfer policy cannot be framed in isolation from other land use regulations. The relationship between market value and perceived development potential on the one hand and permitted asofright densities on the other hand establishes the base context. This relationship must be more or less in balance if the entire regulatory system is to work effectively. In many cases it is clear that existing permitted densities do not make sense in the context of what the market understands as the potential for a parcel of land. In those cases the pressure will be to increase the density through any available means. There are, of course, a number of bonus policies by which additional density may be secured through offering predefined public benefits. In those cases public benefits can be secured without resorting to a density transfer. A transfer is usually necessary where the land is to be used or retained in its present use and the owner is expected to forfeit its development potential wholly or in part for the public good.

8.2 Public Benefits

A density transfer policy should only be used where clear and generally accepted public benefits are to be achieved. The specific benefits to which density transfers might apply must be clearly stated in the policy and the policy should only be applied where the defined benefits are secured. This conclusion emerged clearly in each city which has implemented such a policy.

Success of a density transfer policy can be measured by the degree to which it secures the public benefits for which it is created. Thus the assumption at the outset should be that the policy will be utilized frequently and not that it is a policy for dealing only with problem sites or anomalous situations. There is no reason to limit the range of public benefits which can be secured in this way provided it is the appropriate policy mechanism for achieving those desired ends.

By far the most prevalent objective in undertaking density transfers is the preservation of heritage or landmark buildings. All four municipalities with density transfer provisions have landmark preservation as a stated objective. The creation of open space or parks is another major objective of the density transfer policies in Vancouver and was seriously considered in San Francisco. It is interesting to note that in Vancouver, the creation of public open space or parks has been the predominant reason for seeking density transfers.

Vancouver was the only municipality within the case studies which had defined additional objectives for the implementation of transfer of density policies. These include the achievement of improved urban design and the encouragement of mixed-use development. This latter objective provided the rationale for one of the three density transfers approved to date in that City.

8.3 Rules for Transfer

Once clear public objectives are established for a density transfer, the next step is to define the rules under which the transfer can take place. Here there is a wide variety among the cities which were studied. Some like New York are very restrictive while in San Francisco and Vancouver conditions are more open. It is our conclusion that these rules have a major impact on whether or not the policy will succeed.

There are two basic principles for success. First, that the conditions should be clear, understandable and easy to interpret and operate. Second, the conditions should be limited to achieving the desired ends and not act as a maze of regulations to discourage use of the policy. The rules should achieve real results and not act as arbitrary hurdles.

The primary issues which must be addressed are:

* whether or not the public objective being sought is in fact achieved;

* the impact of the transfer on the location or locations to which it is being transferred; and

* the impact on the land market.

8.4 Location of Transfer

Almost all of the municipalities have explicitly specified the zones between which density can be transferred. Only Vancouver allows for transfers anywhere in the City, although as was expected, most occurred in the Central Area.

In most cases, including Vancouver, the policies require that the density be transferred between the same zoning districts, although no maximum distance between sites is stipulated. New York is even more restrictive, requiring that transfers occur only between adjacent lots. Generally, the transfers are permitted within the highest density zones, either the central business district or a zone in which the municipality wishes to encourage development or preserve existing heritage buildings, such as the Theatre District in New York or the Pedestrian Core Area in Dallas.

The most important issue here is the question of impact on the land market. Allowing transfers between areas which have quite different market values raises major questions of market fairness. The greatest danger perceived in a city such as New York is that a more open policy would severely distort the land market processes and result in speculation leading to major pressures for such transfers, based on speculative land values which presuppose such a transfer. It is clearly beyond the powers, and in fact the purpose, of the planning process to take the differential land values into account. Thus the attempt to keep such transfers within a relatively close geographic proximity or within similarly zoned areas has distinct merit.

In the case of San Francisco, for example, although the city has in effect created a development currency (TDRs) which could be banked for future use, the value is still set by the private market and the relative value of the receiving site. In fact, developers tend not to trust the future of their banked density and all the proposals considered to date have involved the direct transfer of density from one site to another. The planners indicated that developers are concerned about the possible ambiguity over the future value of the TDRs.

8.5 Amount of Density to be Transferred

All of the municipalities we examined determined that the amount of density to be transferred was equal to the development potential of the site less the gross floor area of the existing building which was to be retained.

In most cases the maximum density on both the donor and receiving site could not exceed the sum of the maximum gross floor areas for

the two sites. This does not apply to the "high bulk" areas in New York, where there is no limit to the density which can be transferred to a receiving lot.

This raises the issue of the physical impact of such transfers on the receiving site. In New York there is concern that inappropriate relationships have been created between landmark buildings and adjacent sites to which density has been transferred. To some extent this could be result of the policy itself which restricts such transfers to a limited number of closely adjacent sites. It seems to us that the issue of physical impact on the receiving site and neighbourhood must be established either at the outset as in San Francisco in establishing the policy, or more likely through a process of evaluation clearly defined in the Official Plan.

For American cities, this concern is exacerbated by the single tier system of zoning where there is no Official Plan which formally and legally regulates increases in density over the established zoning. For example, the New York planners feel that density transfers over non-adjacent sites negate the certainty of the zoning ordinance and leave the City open to suit from owners of non-receiving sites. This problem of establishing density on the receiving sites is one of the reasons that certain American cities have shied away from density transfers.

Cities in Ontario are able to establish a process in their Official Plans which will regulate how and under what criteria such transfers can take place. In Vancouver the criteria are clearly spelled out in the Official Plan and this appears to work well. It is our view that such criteria should relate as far as possible to the problem at hand, which is how the proposed building will impact the area in which it is to be located. This test is applied in New York and San Francisco. It should be defined as precisely as possible in terms of issues such as micro climate impacts, transportation impacts, pedestrian impacts, and other relevant urban design issues.

In San Francisco the planners undertook a detailed assessment as to the ability of the receiving district to be able to accommodate the additional density which might be transferred to that area from a limited number of heritage buildings. They concluded that the impact was acceptable. For the same reason the City rejected a much wider policy to assist in creating open space, as it would have had a potentially unlimited application and its impact could not be so clearly established at the outset.

8.6 Banking Density

Several of the planners we interviewed stated that they did not support transfers of density because of the administrative

problems it would cause them not only in determining the appropriate density for receiving sites, but in creating a "banking" system and recovering the value of such transfers.

In San Francisco the banking system is considered to be workable. However, our discussions in each of the other cities leads us to the opposite conclusion. A banking system must depend on the discretion of either bureaucrats or politicians to determine how the banked density will be utilized. It is likely to create considerable pressures on those who must choose. Therefore, a draw-back in establishing such a banking system is that it would likely cause considerable disruption to the land market in creating uncertainty and likely speculation.

8.7 Approval Process

It is interesting to compare the approval process for density transfers in the various cities in our case study to determine which, if any elements, might be worth considering for the City of Toronto.

Vancouver's policies and procedures are very explicitly set out, with clear guidelines on what is acceptable to the City for consideration for a density transfer. The rules are clearly defined and the planners' committment, which is endorsed by their Council, to following them has been demonstrated a number of times. The development community knows exactly where it stands, therefore, in the availability of the mechanism to be used. It is interesting to note that Vancouver's policy has been implemented three times in the three years since its inception.

The San Francisco policy also sets out clear guidelines and limitations, although it allows for more flexibility in the creation and expenditure of the TDR currency. However, this flexibility is offset by stringent regulations regarding height, bulk, and setback as well as by the limitation on office development in the downtown, which effectively restricts the number of density transfers which can occur.

New York's policies, are perhaps the most permissive with respect to the amount of density which can be transferred and built on a receiving site. The process for obtaining approval is long and expensive, however, with consideration required by a number of Commissions having rather discretionary approval powers to control matters of building form and urban design.

The case of Dallas is an interesting illustration of the failure of density transfers to achieve that City's objective, renovation and preservation of historic buildings. It illustrates clearly that in order for the mechanism to work, density must be a scarce commodity, with economic value to the development community. The

extremely high densities permitted as-of-right in Dallas make the extra densities to be achieved through transfers superfluous. Interestingly, Chicago's decision not to implement density transfer policy is also related to the fact that density can be had through extensive bonusing provisions.

8.8 No Exceptions

A density transfer policy can result in the creation of very large real estate values and its potential impact on the land market can be considerable. Therefore, in implementing such a policy, the key to its structure is creating a climate of certainty and eliminating grounds for speculation leading to speculative pressure.

In each city reviewed, it was emphasized that once the rules are established they must under no circumstances be amended to cater to a particular problem or proposal. This attitude of not allowing any amendments is held firmly by the planning staff and the political levels. Developers need to understand the limitations and potential of their sites when they are purchased. In both New York and Vancouver it was made clear that the industry had learned that they should not apply unless their building meets the objective in the first instance and then the criteria of evaluation in the second instance.

It is our view that this certainty is critical to the success of the policy. Combined with it, however, is the obvious point that the more complex the rules the more likely will be the pressure to change them. It is only through creating widely supported public objectives which are then implemented through rules which make clear sense in their relation to the specific proposal, that the climate of certainty can be maintained. Where the rules make no sense and are in fact merely regulatory hurdles they will inevitably be amended, throwing the entire policy into question.